In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1785

WELLMAN INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a)[1] is reported at 490 F. 2d 427. The opinion of the district court is not officially reported (Pet. App. 9a-18a).

JURISDICTION

The judgment of the court of appeals was entered on January 22, 1974, and the Company's petition for rehearing *en banc* was denied on February 28, 1974 (Pet. 2). The petition for a writ of certiorari was filed on May 28, 1974. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

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[1]"Pet. App." refers to the appendix to the petition. "B.A." refers to the petitioner's brief and appendix in the court below.

QUESTION PRESENTED

Whether affidavits obtained by the Board's Regional Director during an administrative investigation of objections to an election conducted under Section 9 of the National Labor Relations Act comprise part of "investigatory files compiled for law enforcement purposes" that are protected against disclosure under Exemption 7 of the Freedom of Information Act.

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, as amended, 5 U.S.C. 552, and the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set out at pp. 3-10 of the petition.

STATEMENT

A. The Board Proceedings

Upon a petition filed under Section 9(c) of the National Labor Relations Act, 29 U.S.C. 159(c), a representation election was conducted among the employees of Wellman Industries, Inc. (herein "the Company") on November 17 and 18, 1971. A majority of the voters rejected the Union[2] as their bargaining representative (B.A. 44). The Union filed objections to the Company's conduct before and during the election. The objections were investigated by the Board's Regional Director, who found that, even resolving the factual issues in the Company's favor, the Company had impermissibly interfered with its employees' free choice in the election.[3] Accordingly, on February 10, 1972, the Director ordered that the first election be set aside, and that a second election be conducted. (B.A. 44-49.)

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[2]The Textile Workers Union of America, AFL-CIO.

[3]The Regional Director found that a handbill circulated by the Company shortly before the polls opened was sufficient, by itself, to warrant setting aside the election because it materially misrepresented the benefits obtained by the Union at another plant which it had organized. The Director thus found it unnecessary to consider the Union's other objections to the election. (B.A. 47-48.)

On February 17, 1972, the Company requested the Regional Director to furnish it with any statements upon which he relied in making his findings. (B.A. 50-52). The Regional Director agreed to provide affidavits of Company officials which the Company had obtained to support its opposition to the Union's objections, if the Company were unable to obtain copies elsewhere (B.A. 52). The Director refused, however, to provide affidavits from the Union's witnesses, which a Board investigator had obtained (B.A. 53).

The Company requested the Board to review the Regional Director's decisions. The Company alleged, *inter alia*, that it had been improperly denied a hearing on the election objections, and denied access to statements obtained by the Regional Office during its investigation of these objections. The Board denied the Company's request for review on the ground that it raised no issues warranting review. (See Exhibits "F" and "G" to the complaint filed by the Company in the district court.)

On April 19 and 20, 1972, a second representation election was conducted among the Company's employees, in which a majority of the voters chose the Union as their bargaining representative.[4] The Company filed objections to the election. The Regional Director, after an administrative investigation, concluded that, even assuming the Company's factual allegations to be true, they did not warrant setting aside the election. Accordingly, the Regional Director certified the Union as the bargaining representative of the Company's employees in the appropriate unit. (B.A. 53-62.)

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[4]577 employees voted for the Union, 466 against (B.A. 53).

The Company requested the Board to review the Regional Director's second decision. The Company again alleged, *inter alia*, that, in the first election, it had been improperly denied a hearing on the objections and denied access to statements relating to those objections. The Board denied the Company's request for review on the ground that it raised no issues warranting review. (See Exhibits "J" and "K" to the complaint filed by the Company in the district court.)

The Union requested the Company to bargain, but the Company refused. The Union thereupon filed charges with the Board and a complaint was issued against the Company alleging that it had refused to bargain in violation of Section 8(a)(5) and (1) of the Act (B.A. 62). When the Company's answer merely challenged the Union's certification (B.A. 67), the Board's General Counsel filed a motion with the Board for summary judgment (B.A. 68). On November 15, 1972, the Board issued an order to show cause why the General Counsel's motion for summary judgment should not be granted (B.A. 69). The Company filed a statement in opposition to the General Counsel's motion for summary judgment, and cross-motions for hearing and production of documents (B.A. 70, 74).

B. The Court Proceedings

On January 25, 1973, before the Board ruled on the General Counsel's motion for summary judgment and the Company's opposition and cross-motions,[5] the Company filed the present suit in the District Court for the District

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[5]On May 30, 1973, the Board denied the General Counsel's motion for summary judgment and ordered a hearing before an Administrative Law Judge on the newly discovered evidence, relating to the second election, presented by the Company. The Law Judge, after a hearing, recommended that the Company's objections to the election be overruled and that the Company be ordered to bargain with the Union. On June 17, 1974, the Board adopted the Law Judge's recommendation. *Wellman Industries, Inc.*, 211 NLRB No. 96. The Company has petitioned the court of appeals for the Fourth Circuit to review the Board's decision and order, No. 74-1732, filed June 26, 1974.

of South Carolina. The Company claimed that it was entitled, under the Freedom of Information Act, to all the affidavits obtained by the Regional Director. The Company also sought to enjoin the unfair labor practice proceeding until the Board held a hearing on the objections to the first election and furnished the affidavits (Pet. App. 10a).

The district court dismissed the Company's complaint in its entirety (Pet. App. 9a-18a). The Company appealed only that portion of the district court's order which refused to grant the relief sought under the Freedom of Information Act. (B.A. (i), 1-3, 20). The court of appeals affirmed the order of the district court, holding that Exemption 7 of the Freedom of Information Act protected the affidavits in question against disclosure (Pet. App. 1a-8a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of other courts of appeals. No issue warranting review is presented.

1. Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7), protects against disclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." The basic question presented by the petition is whether the court of appeals properly concluded that affadavits obtained by the Board's Regional Director, during an administrative investigation of objections to an election conducted under Section 9 of the National Labor Relations Act, are covered by Exemption 7.[6]

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[6]There is no substance to petitioner's contention (Pet. 19-22) that the court of appeals erred in refusing to remand to the district court for an *in camera* inspection of Board files. The record shows that throughout this litigation petitioner has specifically sought only affi-

The courts have held, and petitioner does not question (Pet. 16-17), that Exemption 7 covers files compiled during an investigation of unfair labor practices.[7] Petitioner contends, however, that a different conclusion is required here because the affidavits were obtained in connection with a representation proceeding. The court of appeals properly rejected this contention.

As the court of appeals noted (Pet. App. 6a), "[w]hether or not resulting in an unfair labor practice charge, the Board's purpose" in conducting an election investigation is "to protect and vindicate" the employees' right, guaranteed by Section 7 of the National Labor Relations Act, freely to select or reject a bargaining representative—no less than if the Board were investigating an unfair labor practice charge alleging an abridgement of that right.[8] Ac-

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davits and similar statements obtained by the Regional Director in his investigation of objections to the election of November 17-18, 1971, and the formal record in that proceeding (B.A. 43, 50; Pet. App. 11a). The Board has furnished petitioner with the formal documents requested (B.A. 52, 33-43), and accordingly the only issue involves the producibility of the requested affidavits and statements. That issue can be determined without *in camera* inspection of the affidavits or statements, or the remainder of the Board's investigative files. See *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 93.

[7] *Clement Bros., Inc.* v. *National Labor Relations Board*, 282 F. Supp. 540, 542 (N.D. Ga.), approved in a collateral proceeding, *National Labor Relations Board* v. *Clement Bros., Inc.*, 407 F. 2d 1027, 1031 (C.A. 5); *Barceloneta Shoe Corp.* v. *Compton*, 271 F. Supp. 591, 594 (D.P.R.). See also H. Rep. No. 1497, 89th Cong., 2d Sess. 11 (Pet. App. 6a-7a); *Frankel* v. *Securities and Exchange Commission*, 460 F. 2d 813, 817 (C.A. 2), certiorari denied, 409 U.S. 889; *Evans* v. *Department of Transportation*, 446 F. 2d 821, 824 (C.A. 5), certiorari denied, 405 U.S. 918.

[8] The Company's subsequent refusal to bargain did in fact trigger such a proceeding here *(supra,* p. 4).

cordingly, since both a representation election investigation and an unfair labor practice investigation are "aimed at enforcement of the National Labor Relations Act," they both are undertaken "for law enforcement purposes."[9]

Moreover, the purposes of Exemption 7 are, *inter alia*, "to prevent the premature disclosure of the results of an investigation * * * and to keep confidential the procedures by which the agency conducted its investigation and by which it has obtained information." *Frankel* v. *Securities and Exchange Commission, supra*. Thus, in an investigation into alleged irregularities in a representation election, no less than in an unfair labor practice investigation:

> If an employee knows that statements made by him will be revealed to an employer, he is less likely, for fear of reprisal to make an uninhibited and non-evasive statement. [*Intertype Co.* v. *National Labor Relations Board*, 401 F. 2d 41, 45 (C.A. 4), certiorari denied, 393 U.S. 1049, quoting from *National Labor Relations Board* v. *National Survey Service, Inc.*, 361 F. 2d 199, 206 (C.A. 7).]

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[9]Contrary to petitioner's contention (Pet. 16-19), the fact that a representation proceeding is nonadversary in nature and may not culminate in a final order which is reviewable under Section 10(e) or (f) of the Act, 29 U.S.C. 160(e) or (f), does not establish that an investigation in a representation proceeding is not "for law enforcement purposes" within the meaning of Exemption 7. See *Frankel* v. *Securities and Exchange Commission, supra*; *Evans* v. *Department of Transportation, supra*; *Weisberg* v. *U.S. Department of Justice*, 489 F. 2d 1195 (C.A.D.C.) *en banc*), certiorari denied, May 13, 1974, No. 73-1138; *Center for National Policy Review* v. *Weinberger*, C.A. D.C., No. 73-1090, decided May 21, 1974.

Accord: *National Labor Relations Board* v. *Golden Age Beverage Co.*, 415 F. 2d 26, 34 (C.A. 5). Similarly, other persons would tend to be inhibited in reporting information to the Board if they knew that their statements would be readily producible. See *National Labor Relations Board* v. *Scrivener*, 405 U.S. 117, 121.[10]

2. No independent ground for review is presented by petitioner's contention (Pet. 22-23) that the Board's combined refusal to grant its discovery requests and to hold a hearing on the objections filed to the first election violated "due process of law." The district court correctly concluded that it lacked jurisdiction to review that question since it could be fully "review[ed] by the Circuit Court as provided in the [NLRA]" (Pet. App. 17a).[11] Since petitioner took no appeal from this portion of the district court's decision, that question is not now properly before this Court. In any event, the district court's decision is supported by settled authority. See *Intertype* v. *National Labor Relations Board, supra*, 401 F. 2d at 44; *Vapor Blast Mfg. Co.* v. *Madden*, 280 F. 2d 205, 209 (C.A. 7), certiorari *denied, 364 U.S. 910. See also Meyers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41; *Aircraft and Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752.

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[10]Under the Board's rules (29 C.F.R. 102.118(b)(1)), which have been sustained by the courts (see *Raser Tanning Corp.* v. *National Labor Relations Board*, 276 F. 2d 80, 83 (C.A. 6), certiorari denied, 303 U.S. 830), affidavits taken by Board agents during the course of an investigation are not producible unless and until the person giving the affidavit is called to testify as a witness at a Board hearing. Congress did not intend to alter this rule by passage of the Freedom of Information Act: "Discovery for litigation purposes is not an expressly indicated purpose of the Act." *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24.

[11]Indeed, the Company has recently sought such review (n.5, *supra*).

CONCLUSION

The petition for a writ of certiorari should be denied.[12]

Respectfully submitted.

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SEPTEMBER 1974.

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[12]The Board's petition for certiorari in *National Labor Relations Board* v. *Sears, Roebuck and Company*, No. 73-1233, certiorari granted May 28, 1974, involves a claim that entirely different kinds of Board documents are exempt from disclosure under the Freedom of Information Act, because, *inter alia*, they are investigatory files as defined in Exemption 7. The *Sears* memoranda, in addition, are developed in the course of unfair labor practice proceedings; here, petitioner contends only that the documents are not protected because they relate to a representation proceeding. It would not be appropriate to defer decision on this petition until *Sears* has been decided, because, regardless of whether the Court agrees with our contentions concerning the staff memoranda in *Sears*, the documents here, statements of witnesses obtained in the course of an administrative investigation, clearly are part of investigatory files.